

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
)
MANUAL R. MORFIN) BANKRUPTCY NO. 04-65142
)
Debtor)

MEMORANDUM OPINION AND ORDER

I

Statement of Proceedings

This Chapter 13 case came before the Court for hearing on May 13, 2005 on the Objection by the Chapter 13 Debtor, Manual R. Morfin (“Debtor”), to the Motion by the Estate of James R. Martinez (“Movant”) For Abstention and Relief from Automatic Stay pursuant to 28 U.S.C. §1334(c)(2), 28 U.S.C. §1334(c)(1), as implemented by Fed. R. Bk. P. 5011(b), and §362(d) (“Motion”) filed on March 9, 2005.

Debtor appears by Attorney Parr.

Movant appears by Attorney Gouveia.

Trustee Chael appears

Attorney Ivan Bodensteiner appears Pro se.

Attorney Lonnie Randolph fails Pro se to appear.

Submitted. Arguments heard.

II

Findings of Fact

The material facts as to this contested matter as set out in the Movant’s Motion are not

in dispute.

They are as follows:

1. That on October 12, 2004 the Debtor commenced this Chapter 13 case.
2. That prior to the filing of said Petition a Judgment and Order was entered versus the Debtor and in favor of the Movant on April 28, 2004 in the sum of \$101,796.00, plus interest, by the Lake Superior Court ("State Court") in Cause No. 45D02-0110-ES-168, In re the Estate of James R. Martinez, Deceased ("State Court Proceeding"). Attorney Lonnie Randolph represented the Debtor in this State Court Proceeding.
3. That pursuant to said Judgment and Order the State Court granted the Movant an equitable lien in all of the Debtor's "individual" real and personal property, tangible or intangible, in which "he had an ownership interest from the date hereof...."
4. That at the time the State Court Proceeding was pending versus the Debtor, the Debtor had settled a claim by the Debtor versus the City of East Chicago, Indiana ("City") by which the City was to pay the Debtor the sum of \$45,500.00. ("Settlement Proceeds"). The Debtor was represented by Attorney Ivan Bodensteiner as to the Debtor's Claim versus the City.
5. That the Movant filed Supplemental Garnishment Proceedings in the State Court Proceeding versus the Debtor and the City as Supplemental Defendant to place a lien on the Settlement Proceeds
6. That a Settlement Check in the sum of \$45,500.00 was issued by the City ("Settlement Check") pursuant to said Proceedings Supplemental, and is presently in the possession of the State Court as an exhibit filed in the Proceedings Supplemental.
7. That an issue was raised in the State Court Proceedings Supplemental as to who had priority to the Settlement Check issued by the City as between the Movant, the Debtor, Attorney Randolph, who represented the Debtor in the State Court

Proceedings, and Attorney Bodensteiner, who represented the Debtor in the Claim by the Debtor versus the City.

8. That prior to the State Court deciding this issue of who was entitled to the Settlement Proceeds, the Debtor filed his Chapter 13 Petition which stayed the Proceedings Supplemental in the State Court Proceeding.

The Court takes judicial notice that there are presently pending in this Court the following contested matters:

1. Motion for Declaratory Relief and Modification of the Stay filed by Attorney Randolph, Pro se, on February 7, 2005. This Motion alleges that the Settlement Check issued by the City was assigned by the Debtor to Attorney Randolph on April 5, 2004 and that a declaratory order should be issued that he is the true owner thereof.
2. Motion for Order to Surrender Debtor's Assets and/or Objection to Debtor's Claim of Ownership filed by Attorney Randolph Pro se, on January 28, 2005. This Motion alleges that the Debtor assigned the Settlement Check for Attorney Randolph on April 5, 2004 and that the same should be surrendered to Attorney Randolph.
3. Motion for Order Directing Release of Funds filed by Attorney Bodensteiner on March 4, 2005. This Motion alleges that on April 4, 2004, the Debtor executed an authorization to Attorney Bodensteiner that \$22,500.00 of the \$45,500.00 in Settlement Proceeds were to be paid to Attorney Bodensteiner, and prays for an Order directing that the Estate of Martinez deliver the Settlement Check to him and that the Debtor endorse the Check to the order of Attorney Bodensteiner. ("Contested Matters").

III Discussion

The Movant's Motion requests that this Court abstain from deciding the above Contested Matters pending in this Court, and permit the State Court to adjudicate the respective claims of the Movant, the Debtor, Attorney Randolph and Attorney Bodensteiner to the Settlement Check issued by the City, an issue which is presently pending before the

State Court in the Proceedings Supplemental filed by the Movant versus the Debtor as Defendant and the City as Supplemental Defendant in the State Court Proceeding.

The Movant asserts that mandatory abstention is required by this Court pursuant to 28 U.S.C. §1334(c)(2)¹ and in the alternative that this Court should exercise its discretionary abstention pursuant to 28 U.S.C. §1334 (c)(1).²

The Debtor in his Objection asserts that the Court should retain jurisdiction over who is entitled to the Settlement Proceeds in that said Proceeds are a major asset of the Debtor's estate, and the determination of who is entitled thereto by this Court is essential before the Debtor's Plan can be Confirmed. However, the Debtor's Plan provides for surrender of substantially all of the Settlement Proceeds to Attorney Randolph and Attorney Bodensteiner to satisfy their respective Claims thereto.

The initial inquiry in resolving the Movant's Motion for Mandatory Abstention pursuant to 28 U.S.C. §1334(c)(2), is whether the Proceedings Supplemental presently pending in the State Court Proceeding as to the Settlement Check issued by the City is a "core" proceeding, or a "related" proceeding as to the Debtor's bankruptcy case. In determining whether a proceeding is a "core", the court must initially refer to 28 U.S.C. §1334(b) which sets forth the general jurisdiction of the bankruptcy and district courts. This

¹ 28 U.S.C. §1334(c)(2) states as follows: "Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

² 28 U.S.C. §1334(c)(1) states as follows: "Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State Courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."

section states:

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

A “Core” proceeding has been defined by the bankruptcy code as follows:

A proceeding is core under section 157 [of Title 28] if it involves a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.

Diamond Mortg. Corp. of Illinois v. Sugar, 913 F.2d 1233, 1239 (7th Cir. 1990), citing, Barnett v. Stern, 909 F.2d 973, 981 (7th Cir. 1990) (quoting, In re Wood, 824 F.2d 90, 97 95th Cir. 1987)); see also, Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161-62 (7th Cir. 1994); In re GFX Ry., Inc., 85 B.R. 431, 433 (Bankr. N. D. Ohio 1987) (discussing civil proceedings “arising under”, “arising in”, and “related” to a case under 28 U.S.C. §1334(b)); In re Adams, 133 B.R. 191, 196 (Bankr. W.D. Mich. 1991); Drexel Burnham Lambert Group v. Vigilant Ins., 130 B.R. 405, 407 (S.D.N.Y. 1991); Collier on Bankruptcy,

¶[4][c](i)(ii)(iii)

and iv), pp. 3-20 to 3-24 (L. King 15th Ed. Rev.)

The bankruptcy court only has subject-matter jurisdiction of a related or “non-core” proceeding under 28 U.S.C. §157(c)(1) when the dispute:

1. Affects the amount of money available for distribution to creditors; or
2. The allocation of property among creditors

Matter of Xonics, 813 F.2d 127, 131 (7th Cir. 1987). See also, Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161-62 (7th Cir. 1994); Matter of Memorial Estates, 950 F.2d

1364, 1368 (7th Cir. 1991); In the Matter of Richard A. Kulby, et. al., 818 F.2d 643, 645 (7th Cir. 1989); Home Ins. Co. v. Cooper and Cooper, Ltd., 889 F.2d 745, 749 (7th Cir. 1989).

The United States Supreme Court in the case of Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995), stated that “congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the estate.” Id., 115 S. Ct. at 1499 (quoting, Pacor v. Higgins 743 F.2d 984, 994 (3rd Cir. 1984)). The Court in Celotex also observed that the “related” language of 28 U.S.C. §1334(b) must be read to give district courts (and bankruptcy courts under 28 U.S.C. §157(a)) jurisdiction over more than simple proceedings involving property of the debtor or the estate, but that a bankruptcy court’s “related to” jurisdiction cannot be limitless. Id. The Supreme Court in Celotex also observed that proceedings “related to” the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. §541, and (2) suits between third parties which have an effect on the bankruptcy estate. Id., 115 S. Ct. at 1498-99 + N. 5. (citing, 1 Collier on Bankruptcy ¶3.01[1][c][iv], p. 3-28 (15th ed. 1994), and Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982)). The Supreme Court noted there is a difference between the circuits as to the test for determining the existence of “related to” jurisdiction, but that whatever test is used, the cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor. Id., 115 S. Ct. 1499 + n. 6. The Supreme Court also observed that the jurisdiction of bankruptcy courts may extend more broadly in a chapter 11 reorganization than in a chapter 7 liquidation. Id., 115 S. Ct. at

1500. This would also be true as to a Chapter 13 reorganization such as the Debtor's case.

Applying the test laid down in Diamond Mortgage Co. v. Sugar, 913 F.2d at 1239, supra, this Court concludes that the Proceedings Supplemental presently pending in the State Court Proceeding is not a core proceeding as defined in 28 U.S.C. §157(b)(2). The Proceedings Supplemental arose prepetition, is based on state law, and does not implicate a substantive right provided by title 11, nor is the Proceedings Supplemental of a nature that it could arise only in the context of a bankruptcy case. Absent the Debtor's bankruptcy, the Movant could have still asserted its claim versus the Settlement Check issued by the city in its Proceedings Supplemental filed versus the Debtor in the State Court completely independent of the Bankruptcy Code based on state law. See, Res-Com Heating, Inc. v. Mulhem, Adv. Pro. 92-6124 (In re Res-com Heating, Case No. 92-60047) (Bankr. N. D. Ind., June 8, 1993), (collecting cases), and concluding that an adversary proceeding by a debtor to collect a prepetition account receivable was a related proceeding).

However, because the Proceedings Supplemental seeks a garnishment lien versus the Settlement Proceeds due and owing by the City to the Debtor, based on the prepetition judgment entered versus the Debtor and in favor of the Movant in the State Court Proceeding, the disposition of the Proceedings Supplemental may ultimately affect the amount of money available for distribution to creditors, or the allocation of property among creditors, and thus satisfies the Seventh Circuit's narrower test as to "related to" jurisdiction outlined in Matter of Xonics, 813 F.2d at 131 Supra, as well as the test set out by the United States Supreme Court in Celotex Corp. v. Edwards, 115 S. Ct. 1493 supra. Therefore, this Court has subject-matter jurisdiction over the three Contested Matters pending in the Court which

request this Court to adjudicate who is entitled to the Settlement Proceeds as related or non-core proceedings. See e.g., Matter of Memorial Estates, Inc., 950 F.2d at 1367-68, supra, (Bankruptcy Court had jurisdiction over foreclosure proceeding filed by the mortgagee of debtor that was removed to bankruptcy court after mortgagor-debtor filed bankruptcy as a “related” proceeding).

The Court having concluded that the Proceedings Supplemental pending in the State Court is a related proceeding, the Court must next determine if it must mandatorily abstain from hearing the Contested Matters presently before the Court seeking a determination of who is entitled to the Settlement Check issued by the City pursuant to 28 U.S.C. §1334(c)(2), or if mandatory abstention is not indicated, the Court should exercise its discretion to abstain pursuant to 28 U.S.C. §1334(c)(1).

Section 1334(c)(2) requires that the Motion be “timely”. Things Remembered, Inc. v. BGTV, Inc., 151 B.R. 827, 832 (Bankr. N. D. Ohio 1993) (25 days held timely). No bar date set was ever set to file a Motion to Abstain, nor is one found in the Code or the Rules. See Fed. R. Bk. P. 5011. The definition of the word “timely” is not found in the Code or the Rules. The determination of the timeliness of a motion to abstain appears to be in the sound discretion of the Bankruptcy Court. The Motion to Abstain was filed on March 9, 2005, while the Debtor’s Chapter 13 case was commenced on October 12, 2004. Thus, the Motion by the Debtor was filed over four months after the Debtor had filed his Petition. Is this timely? A review of the case law of this issue indicates that the Courts have reached varied results based on the particular facts of the case. See e.g., In re Novak, 116 B.R. 626, 628 (N.D. Ill. 1990) (Motion nearly one year after complaint filed not timely); Acolyte Elec.

Corp. v. City of New York, 69 B.R. 155, 177 (Bankr. E.D.N.Y. 1986) (Motion timely when filed less than two months after filing of Adversary Complaint); In re Consulting Actual Partners Ltd., Ptn., 72 B.R. 821, 827-28 (Bankr. S.D.N.Y. 1987) (Motion timely when made promptly after initiation of adversary proceeding); In re World Solar Corp., 81 B.R. 603, 607-08 (Bankr. S.D. Cal. 1988) (Motion to abstain filed after six months not untimely under the circumstances); Dunkirk Limited Partnership v. TJX Companies, Inc., 139 B.R. 643, 645-46 (N.D. Ohio 1992) (Motion to Abstain 20 days after removal was timely); In re Adams, 133 B.R. 191, 195 (Bankr. W.D. Mich. 1991) (Motion for abstention 21 days after removal timely). In this case the Motion to Abstain was filed on March 9, 2005, or only forty days after Attorney Randolph filed his Motion for an Order to Surrender Debtor's Assets and for Objection to Debtor's Claim of Ownership on January 28, 2005 and only five days after Attorney Bodensteiner filed his Motion for an Order Directing Release of Funds filed on March 4, 2005. Thus, the Court finds that the Movant's Motion was timely filed under the circumstances.

Upon finding that a timely Motion to Mandatorily Abstain has been filed by the Debtor, the Court must abstain pursuant to 28 U.S.C. §1334(c)(2) when the following four requirements are met:

1. The case is based on a state law claim or cause of action that although related to title 11 does not arise under title 11, or arise under a case under title 11;
2. There is no independent basis for federal jurisdiction for the claim other than the bankruptcy proceeding;
3. An action has been commenced in a state court forum; and

4. The case could be timely adjudicated in the state court.

In re Chipman, 132 B.R. 153, 157 (Bankr. N.D. Ill. 1991); Bates & Rogers Construction Corp. v. Continental Bank, N.A., 97 B.R. 905, 907 (N.D. Ill. 1989); Allen County Bank & Trust Co. v. Valvomatic International Corp., 51 B.R. 578, 583 (N.D. Ind. 1985).

As previously observed, mandatory abstention under 28 U.S.C. §1334(c)(2) applies only to non-core or related proceedings, and not to core proceedings, for that section only mandates abstention from hearing a proceeding based on a State Law Claim, or a State Law cause of action that is “[r]elated to a case under title 11, but not arising under title 11, or arising in a case under title 11 with respect to an action that could not have been commenced in a Court of the United States absent jurisdiction under this section....” See In re Chipman, 132 B.R. at 157, *supra*; In re Turner, 70 B.R. 486, 488-89 (Bankr. D. Mont. 1987); In re Harbour, 60 B.R. 370, 371 (W.D. Va. 1985); Collier on Bankruptcy, §3.05 (2) pp. 3-71 to 3-73 (L. King 15th Ed. Rev.). The Movant has satisfied this element in that the Court has previously concluded that the Proceedings Supplemental presently pending in the State Court is a related proceeding in that it is based on prepetition state law claims, and could not have been commenced in a Court of the United States absent jurisdiction under 28 U.S.C. §1334(b).

The remaining factors to be considered in determining whether mandatory abstention is dictated are the following:

1. An action has been commenced in a state court forum;
2. Whether the proceeding can be timely adjudicated in a state forum of appropriate jurisdiction.

First, there is no question that the State Court Proceeding had been commenced in a state court forum prior to the filing of the Debtor's Chapter 13 petition, that involves the same subject matter as the Contested Matters presently pending before this Court. Thus, this provision of 28 U.S.C. §1334(c)(2) has also been satisfied by the Debtor.

The final issue under §1334(c)(2) is whether the Proceedings Supplemental can be timely adjudicated in a state court forum of appropriate jurisdiction. There is no certain standard for what constitutes timely adjudication in the state court forum. In re Georgou, 57 B.R. 847, 851 (Bankr. N.D. Ill. 1993) (The standard for what constitutes timeliness is uncertain). As a result, the issue is one of judicial discretion. Id. Where a dispute exists as to whether an action can be timely adjudicated in the State Court, the moving party bears the burden of persuasion. Id., 157 B.R. at 850-51. In attempting to evaluate timeliness, the Courts have considered the following factors: (1) The backlog of the State Court's calendar; (2) The status of the bankruptcy proceeding; (3) The complexity of the issues presented; and (4) whether the State Court proceeding would prolong the administration or liquidation of the estate. Id., 157 B.R. at 851. As the Court in J. D. Marshall Intern, Inc. v. Redstart, Inc., 74 B.R. 651 (N.D. Ill. 1987) stated:

Where a dispute exists, the party motioning for mandatory abstention under §1334(c)(2) carries the burden of proving the action can be timely adjudicated in the state forum. Court's discussing whether the timely adjudication element exists examine the following factors: (1) backlog of the state court's calendar, (2) status of the bankruptcy proceeding would prolong the administration or liquidation of the estate. See In re DeLorean Motor, 49 B.R. 900, 911 (Bankr. E.D. Mich. 1985); In re Boughton, 49 B.R. 312, 315-16 (Bankr. N.D. Ill. 1985), aff'd, 60 B.R. 373 (N.D. Ill. 1986). Examination of the foregoing factors is undertaken to determine whether allowing the state court action to proceed will have any unfavorable effects on the pending bankruptcy petition as it is clear that §1334(c)(2) does not mandate

abstention where irreparable delay will result or injury to the estate or its creditors will occur. In re DeLorean Motor Co., 49 B.R. at 911; In re Butcher, 49 B.R. 109, 113 (Bankr. N.D. Ga. 1985).

Id., 74 B.R. at 65455.

The present status of the State Court Proceeding, indicates that the issues raised by the Contested Matters presently pending in this Court can be timely adjudicated by the State Court Proceeding in the Proceedings Supplemental presently pending before the State Court. The State Court has already developed the knowledge and expertise to timely adjudicate all of the issues related to the Proceedings Supplemental presently pending before it that have been subsequently raised by the Contested Matters pending in this Court, and thus the State Court can adjudicate the State Court Proceeding much more expeditiously than this Court. The Contested Matters raise only substantive issues of state law that are complex, and not any substantive issues provided by Title 11 or that could only arise in a bankruptcy case, and thus they can be more expeditiously and efficiently addressed by the State Court, who is already familiar with the facts of the case, and the state law applicable thereto. If this Court did not abstain as to these Contested Matters, it would have to spend considerable time and effort in becoming acquainted with the merits thereof, something the State Court has already done. If this Court decided to deny the Movant's Motion to Abstain, it would also cause a duplication and uneconomical use of scarce judicial resources. See, e.g., O'Rourke v. Cairns, 129 B.R. 87, 90-91 (E.D. La. 1991). In addition, abstention will not unnecessarily prolong the administration of the Debtor's estate as there is an Objection to Confirmation pending by the Estate of Martinez that will not be scheduled for a final hearing before September of 2005. Accordingly, the Movant's Motion to Abstain shall be GRANTED. Where a

bankruptcy court may abstain from deciding issues in favor of an imminent State Court trial involving the same issues, cause may exist for lifting the stay as to the State Court trial. In re Tuscon Estates, Inc., 912 F.2d 1162, 1166 (9th Cir. 1990). It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Motion by the Estate of James R. Martinez to Abstain pursuant to 28 U.S.C. §1334(c)(2) from further consideration of the Contested Matters filed by Attorney Randolph and Attorney Bodensteiner in this Court, is hereby GRANTED. And it is further,

ORDERED, ADJUDGED, AND DECREED, that for cause shown, the Automatic Stay should be and is hereby Modified pursuant to 11 U.S.C. §362(d)(1), and the Movant is hereby authorized to prosecute its Proceedings Supplemental pending in the Lake Superior Court under Cause No. 45DO2-0110-ES-168 to a final nonappealable Order relating to the Settlement Check issued by the City of East Chicago, Indiana to the Debtor in the sum of \$45,500.00. And it is further,

ORDERED, ADJUDGED, AND DECREED, that for cause show the Automatic Stay should be and is hereby modified sua sponte pursuant to 11 U.S.C. §362(d)(1), and Attorney Lonnie Randolph and Attorney Ivan Bodensteiner are hereby authorized to intervene in said Proceedings Supplemental and assert any right, title or interest that they may have in said Settlement Check. And it is further,

ORDERED, ADJUDGED, AND DECREED, that upon the entry of a final, nonappealable Order in the State Court, this Court shall give resjudicata or claim preclusion effect thereto.

The Clerk shall enter these Orders on a separate document pursuant to Fed. R. Bk. P.

9021.

Dated: May 20, 2005

JUDGE, U. S. BANKRUPTCY COURT

Distribution:

Debtor

Attorney Parr

Attorney Gouveia

Attorney Randolph

Attorney Bodensteiner

Trustee

U.S. Trustee